JUN 14 1961
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. [redacted].

ANTHONY D'ALESSIO,

Petitioner,

vs.

THOMAS M. PEDERSON,
District Director,
Immigration & Naturalization Service,
(Successor to John M. Lehmann),

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

HENRY C. LAVINE,

1000 Marshall Bldg.,
Cleveland 15, Ohio,

Attorney for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9847

TABLE OF CONTENTS.

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Question Presented 2

Statement of Facts 2

Argument and Law 4

Conclusion 9

APPENDIX:

Memorandum Opinion of the United States District Court 11

Opinion of the United States Court of Appeals for the Sixth Circuit 17

Judgment of the United States Court of Appeals 19

Authorities.

Gay v. United States, 57 Court of Claims 424 7

8 U. S. C. 7 4

8 U. S. C. 8 ..... 4, 5

8 U. S. C. 17 ..... 7, 8

8 U. S. C. 1251 (a) (4) 2

In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. .....

ANTHONY D'ALESSIO,

Petitioner,

vs.

THOMAS M. PEDERSON,
District Director,
Immigration & Naturalization Service,
(Successor to John M. Lehmann),

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the order of the United States District Court for the Northern District of Ohio which had denied the petition for review, and for an order reversing the order of deportation theretofore entered in this case.

OPINIONS BELOW.

The opinion of the Court of Appeals is set forth in the Appendix, *infra*, p. 17. The memorandum opinion of the District Court (App. *infra*, p. 11) appears in 183 F. Supp. 345.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 26, 1961 (App., *infra*, p. 19). The jurisdiction of this Court is invoked under Section 1251(a)(4), Title 8, U. S. C.

STATUTES INVOLVED.

The Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, provides in pertinent part:

> "Section 241(a)(4), 66 Stat. 204, 8 U. S. C. (1952 ed.) 1251(a)(4), 8 U. S. C. A., Section 1431:
>
> "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> "(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial."

QUESTION PRESENTED.

Whether the petitioner is an alien and subject to deportation.

STATEMENT OF FACTS.

Petitioner is 39 years of age, married to a native-born citizen of the United States, and is the father of two children, Ronald, 19 years old, and Stephanie, 13 years old, both of whom were born in the United States.

Petitioner was born in Italy and came to the United States in 1929, with his mother, at the time he was 7 years

old, and he has remained continuously in this country since 1929.

Petitioner's grandfather became a citizen of the United States in 1899 and by this act petitioner's father, who was also born in Italy, became a derivative citizen.

This petitioner registered for the draft for World War II and by virtue of such registration was drafted into the armed forces of the United States, at which time he was recognized and considered as a citizen of the United States. His mother, who brought him to the United States, was also considered a citizen of the United States at the time of their arrival here and at all times since she married petitioner's father under the law then in existence. His father was a citizen of the United States, as stated above, although he came to the United States for the first time when this petitioner was one year old.

Petitioner was convicted of the crime of burglary on January 8, 1952, and again, on March 3, 1955, he was convicted of burglary and sentenced under Ohio law for an indeterminate term of from one to five years. Under the 1952 conviction he was granted a suspended sentence.

It is contended here that the District Court erred in its opinion ordering this petitioner to be deported, and that the Sixth Circuit Court of Appeals erred in affirming the finding of the District Court for the Northern District of Ohio. We therefore contend herein that the petitioner is now a citizen of the United States, and has always been a citizen of the United States, and that therefore, he cannot be deported in accordance with the order of both Courts.

ARGUMENT AND LAW.

Petitioner in this case relies, among other things, on Title 8, Section 7, U. S. C., and Title 8, Section 8, U. S. C. Section 7 reads:

> "*Citizenship of children of persons naturalized under certain laws.* The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; *and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States be considered as citizens thereof.*"

The District Court in the opinion says:

> "Petitioner relies upon the italicized language as endowing him with the rights of citizenship. The Government contends, however, that the italicized language, which derives from the April 14, 1802 Act, refers to a child born abroad of parents who were citizens of the United States on or before April 14, 1802."

Petitioner contends that the law is clear that children born abroad, whose fathers were, or shall be at the time of the birth, citizens of the United States, are also to be considered as citizens of the United States.

In this case both the father and the mother were citizens of the United States when this child, the petitioner herein, was born. The father was a citizen by derivation and the mother became a citizen when she married him under the law then existing. Therefore, it is our contention

that this petitioner is and has been a citizen of the United States at all times.

Furthermore, the military authorities considered him a citizen when they took him into the Army.

The State Department considered the mother, as well as the child, citizens when they issued her a United States passport.

The father of this petitioner was considered a citizen of the United States, non-quota, when he was admitted to the United States.

From the evidence it appears that all this petitioner's employers considered him to be a citizen of this country.

We do not agree with the District Court's reasoning in its opinion, which was upheld by the Sixth Circuit Court of Appeals, to the effect that neither the mother nor her child, this petitioner, were citizens of the United States when they came here in 1929. At the same time, the Court reasons in a different argument that they were not aliens, either, and therefore could not take advantage of Section 8, of Title 8, as is set forth in the Memorandum of Opinion.

The Court finds that this petitioner cannot be considered a citizen by derivation because his father was never in the United States prior to this petitioner's birth. Further, that he could not be a citizen by reason of his mother's citizenship because she lived too long in Italy after she became a citizen of the United States. And yet, the Court says that they were not aliens, either, and therefore this petitioner could not take advantage of the Section mentioned above, Section 8 of Title 8, U. S. C.

It seems to the undersigned that this petitioner is being discriminated against in an unreasonable, improper and unfair manner. His parents, or either one of them, were either citizens of the United States at the time of his

coming here, or, if not, then they were aliens. It has to be one or the other. And if that were not exactly so, there is no question in this case that the father acted as a citizen during the minority of this child. If the child was not a citizen at birth, he became a citizen and the citizenship of such child "shall begin at the time such minor child begins to reside permanently in the United States."

In the District Court's opinion, as appears in the Memorandum of Opinion, *infra*, pp. 16-17, the Court says:

> "As shown by the evidence, petitioner's mother traveled from Italy to this country on a United States passport. It would appear, therefore, that at the time of her departure from Italy in 1929 the mother was able to satisfy the State Department officials that she had not ceased to be an American citizen and was entitled to the protection of the United States Government."

It does appear, then, that petitioner's mother did take some step to satisfy the State Department officials, when they issued her an American passport, that she had not ceased to be an American citizen, and, that she was then entitled to the protection of the United States Government. If the State Department would not have been satisfied at that time when this application for her travel to the United States as a permanent resident came up for consideration in Italy, the same officials of the State Department certainly would not have granted her this passport if there were any doubts that she had ceased to be an American citizen. And, of course, when she received this American passport she had to take an oath that she still was a citizen of the United States with full intention of living the part of an American citizen, and this oath that she considered herself an American citizen at that time certainly was equal to any other method that the District Court would have preferred to have taken

place at the time when she received her American passport. In order for her to obtain this American passport at that time she was compelled to present "satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe."

In the absence of any evidence that she made fraudulent statements to a diplomatic or consular officer of the United States at the time she applied for this American passport, it must be presumed that she obtained it in a proper manner. It must be accepted that her receiving this passport in the absence of any fraudulent or mistaken representations was a bona fide act on the part of the consular officer, as well as herself.

The Government is silent on the question whether she presented the proper evidence to the officials of the State Department, either to the diplomatic or consular office of that Department, when this passport was given to her, and it should be accepted by the Trial Court and the Appellate Court that she complied with Title 8, Section 17, which reads as follows:

> "When any naturalized citizen shall have resided for two years in the foreign State from which he came, or for five years in any other foreign State it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said year. *Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States,* under such rules and regulations as the Department of State may prescribe." (Emphasis supplied.)

In this connection it is important to read in the District Court's opinion, when he cites the case of *Gay v. United States*, 57 Court of Claims 424:

"It was held in *Gay v. United States*, 57 Court of Claims, 424, that the purpose of the last quoted section is to authorize the State Department to refuse to extend the protection of the United States Government to naturalized citizens who have remained in foreign countries for five years continuously and fail to satisfy the officers of the State Department that they intend to return to and reside in the United States. The decision of the Court of Claims was affirmed by the Supreme Court in *United States v. Gay*, 264 U. S. 353. In the latter case the Supreme Court made the following statements in respect of the presumption:

> '* * * and it is a presumption easy to preclude and easy to overcome. It is a matter of option and intention.' "

We desire to emphasize the statement that appears in that quote on the part of the District Judge. He says, "that the purpose of the last quoted section (meaning Title 8, Section 17), is to authorize the State Department to refuse to extend the protection of the United States Government to naturalized citizens who have remained in foreign countries for five years continuously and *failed to satisfy the officers of the State Department* that they intend to return to and reside in the United States." We then have a right to deduce from that statement that if a naturalized citizen who overstayed in a foreign country (which is analogous to this petitioner's mother overstaying in Italy), did satisfy the State Department that she was still an American citizen, it would be sufficient, according to that case, that she has overcome any presumption that might have been in evidence against her on account of the overstaying, and her admission to the United States means, then, that she was still a citizen and considered so by the State Department at the time they issued the passport, and

as the District Court emphasizes, especially in that opinion which reads as follows:

> "* * * and it is a presumption easy to preclude and easy to overcome. It is a matter of option and intention."

In our instance the option that was exercised by this petitioner's mother when she appeared at the State Department, either consular or diplomatic, was of course coupled with her intention to remain and be a citizen of the United States, as she considered herself and as the Statement Department considered her to be, and should make no problem for the District Court to find in her favor rather than against her for any technical reason that he mentions in his opinion denying the petitioner's claim.

CONCLUSION.

It is believed that the District Judge erred in his finding that the petitioner cannot claim citizenship either through his father or through his mother, and further erred in his ignoring the petitioner's acceptance by the military as being a United States citizen where he served three or four years; further, that he erred when he ignored the acceptance by the State Department, consular or diplomatic, of the same finding that petitioner was a citizen when he came to the United States with his mother. The District Judge further erred in his holding that the mother did not satisfy or overcome any presumption that she was a United States citizen at the time that she applied for and was granted an American passport as a bona fide citizen of the United States; and that the Sixth Circuit Court of Appeals erred in affirming the decision of the District Judge.

It is respectfully urged that both courts have committed error, and therefore, that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY C. LAVINE,

Attorney for Petitioner.

APPENDIX.

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT.

McNAMEE, *J.*:

This case is unusual in that Petitioner, who has been ordered deported, has resided in this country continuously for 27 years in the belief that he was at all times a citizen of the United States. The military authorities of the United States apparently were of the same opinion at the time Petitioner was inducted into the Armed Forces of the United States during the last World War. It appears also that the various employers of Petitioner considered him to be a citizen of this country. Petitioner's presumed status as a citizen was based upon the literal language of R. S. 1993, which was in effect at the time of Petitioner's birth in 1922, but, as will hereinafter be shown, the construction of the above statute in *Weedin v. Chin Bow*, 274 U. S. 657 (1927), as applied to the facts of this case, demonstrates that Petitioner at the time of his entry into this country was an alien. The question presented is whether Petitioner is still an alien and subject to deportation.

On February 16, 1957, after proper hearing, Petitioner was ordered deported by the District Director of the Immigration and Naturalization Service at Cleveland, Ohio. Petitioner appealed the decision of the District Director and on November 20, 1957 the Board of Immigration Appeals denied the appeal. In his petition in this Court the Petitioner claims that he is an American citizen and that the order of deportation is a nullity. The facts which are not in dispute are:

Petitioner's grandfather, Antonio D'Alessio, was naturalized as a citizen of the United States on July 1, 1899. By virtue of the provisions of R. S. 1993, the Peti-

tioner's father, Francesco D'Alessio, became a citizen of this country at the time of his birth in Italy on May 29, 1900. The Petitioner's mother became a citizen at the time of her marriage on May 15, 1921 to Francesco D'Alessio. Sec. R. S. 1994. Petitioner was born in Italy on June 10, 1922. The father came to this country on September 6, 1923. Petitioner entered this country with his mother on November 17, 1929, at which time he was admitted for permanent residence as a non-quota immigrant. The mother was issued a United States passport at Naples, Italy. Petitioner has remained in this country continuously since his entry in 1929. In June 1942 he registered for Selective Service and in April 1943 was inducted into the Army. He was dishonorably discharged from the military service in August, 1946. Petitioner was convicted of the crime of burglary on January 8, 1952, but execution of sentence was suspended and he was placed on probation. Again, on March 3, 1955, he was convicted of burglary and sentenced to imprisonment under Ohio law for an indeterminate term of from one to five years.

There is no doubt that if Petitioner is an alien he is subject to deportation under Section 1251(a)(4), Title 8 U. S. C. The controlling statute on the issue of citizenship is Title 8, Section 6 U. S. C., derived from R. S. 1993, which in pertinent part read:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; *but the rights of citizenship shall not descend to children whose fathers never resided in the United States.*" (Emphasis supplied.)

In *Weedin v. Chin Bow, supra,* the Supreme Court construed the provisions of R. S. 1993 and distinguished

between descent of property which occurs at or after the death of an ancestor and the descent of citizenship which occurs at the birth of the child saying—

> "The transmission of the right of citizenship is not at the death of the ancestor but at the birth of the child, * * *." (p. 675.)

The Court also construed the phrase "whose fathers never resided in the United States" to mean whose fathers never resided in the United States *before* the birth of the child. Accordingly the Court held that under R. S. 1993, "Citizenship attaches only when the father has resided in the United States before the birth of the child."

As shown by the admitted facts, Petitioner's father did not reside in the United States until more than a year after Petitioner's birth in Italy. Therefore, under R. S. 1993, as construed by the Supreme Court, Petitioner did not acquire the rights of citizenship by descent.

Petitioner seeks to avoid the effect of *Weedin v. Chin Bow, supra,* by reliance upon Title 8, Sec. 7 U. S. C. and Title 8, Sec. 8 U. S. C. Section 7 reads:

> "*Citizenship of children of persons naturalized under certain laws.* The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; *and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States be considered as citizens thereof.*" (Emphasis supplied.)

Petitioner relies upon the italicized language as endowing him with the rights of citizenship. The Government contends, however, that the italicized language, which derives from the April 14, 1802 Act, refers to a child born abroad of parents who were citizens of the United States on or before April 14, 1802. The Government's position is supported by expressions of the Supreme Court in *Weedin v. Chin Bow, supra,* and *United States v. Wong Kim Ark,* 169 U. S. 649, as well as by Congressional action in 1855. In both of the cited cases reference is made to an article written by Horace Binney and published in 1853, in which the author noted that under the provision of the Act of April 14, 1802 (which is identical with the italicized language of Section 7 above) children born abroad of parents who became American citizens after April 14, 1802 were aliens. In *Wong Kim Ark, supra,* Mr. Justice Gray, speaking of the provisions of the Act of 1802, said:

> "But the provision concerning foreign-born children, being expressly limited to the children of persons who then were or had been citizens, clearly did not include foreign-born children of any person who became a citizen since it enactment. 2 Kent Com. 52, 53; Binney on Alienigenus, 20, 25; 2 Am. Law Reg. 203, 205. Mr. Binney's paper, as he states in his preface, was printed by him in the hope that Congress might supply this defect in our law." (p. 673.)

In *Weedin v. Chin Bow,* Chief Justice Taft said:

> "Mr. Binney demonstrates that, under the law then existing, the children of citizens of the United States born abroad, and whose parents were not citizens of the United States on or before the 14th of April, 1802, were aliens, because the Act of 1802 only applied to such parents, and because, under the common law which applied in this country, the children of citizens born abroad were not citizens but were aliens." (p. 663.)

In response to Mr. Binney's suggestion, Congress, on April 10, 1855, enacted R. S. 1993, which conferred the right of citizenship upon children born abroad "whose fathers were or shall be at the time of their birth citizens of the United States." The language of Section 7 here in question was incorporated in R. S. 2172 in 1878. Section 7, like its predecessor, relates only to the right of children of naturalized parents and the italicized language must be construed as referring to children born aboard whose parents were citizens at or prior to the adoption of the Act of 1802 or the adoption of R. S. 2172. Obviously the parents of Petitioner were not citizens at either of the times indicated above and Petitioner acquired no right of citizenship under the language of Section 7, upon which he relies.

Section 8, Title 8, reads:

> "A child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent, where such naturalization or resumption takes place during the minority of such child. The citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

This section is of no aid to the Petitioner. He was not born of alien parents. At the time of his birth both his father and mother were citizens of the United States. Nor was there any naturalization or resumption of citizenship by either parent. Petitioner contends, however, that by reason of her continued residence in Italy for 8 years after she became a citizen a presumption arose that his mother ceased to be an American citizen and presumably resumed her citizenship after her re-entry into this country in 1929. Section 3, Chapter 411, U. S. Stat. at Large, effective

March 2, 1907, provides in effect that a woman who becomes a citizen by virtue of her marriage, residing continuously outside the United States for 5 years, is subject to the same presumption as a naturalized citizen. The presumption referred to is set forth in Title 8, Sec. 17, which, in pertinent part, reads:

> "When any naturalized citizen shall have resided for two years in the foreign State from which he came, or for five years in any other foreign State it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said year. Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe."

It was held in *Gay v. United States,* 57 Court of Claims, 424 that the purpose of the last quoted section is to authorize the State Department to refuse to extend the protection of the United States Government to naturalized citizens who have remained in foreign countries for five years continuously and fail to satisfy the officers of the State Department that they intend to return to and reside in the United States. The decision of the Court of Claims was affirmed by the Supreme Court in *United States v. Gay,* 264 U. S. 353. In the latter case the Supreme Court made the following statements in respect of the presumption:

> "* * * and it is a presumption easy to preclude and easy to overcome. It is a matter of option and intention."

As shown by the evidence, Petitioner's mother traveled from Italy to this country on a United States passport. It would appear, therefore, that at the time of

her departure from Italy in 1929 the mother was able to satisfy the State Department officials that she had not ceased to be an American citizen and was entitled to the protection of the United States Government. Petitioner's claim that his mother lost her citizenship is not supported by the facts. Even if the contrary were true, there is no evidence tending to show any act of the mother after her entry into this country indicating a resumption of citizenship. Prior to her entry in 1929 she had never resided in this country. If she lost her citizenship while residing in a foreign country it would seem that in order to resume it she would be required to be naturalized or at least take an oath of allegiance before a court of competent jurisdiction. The record discloses no evidence of either of the above procedures. Upon the record made at the hearing it must be held that Petitioner is an alien and by reason of his commission of two separate crimes is deportable under Section 1251 (a) (4), Title 8, U. S. C.

Petition is dismissed.

United States District Judge.

February __, 1960.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided April 26, 1961.)

Before: MARTIN, MCALLISTER and WEICK, Circuit Judges:

PER CURIAM. This appeal is from an order of the District Court denying a petition to stay an order of deportation. The sole issue was whether appellant is a citizen of the United States. If an alien, he was subject to deporta-

tion under the provisions of Section 1251(a)(4), Title 8, U. S. C.

Appellant's grandfather was naturalized as a citizen of the United States on July 1, 1899. His father became a citizen of the United States under the provisions of R. S. 1993 at the time of his birth in Italy. Appellant's mother became a citizen at the time of her marriage on May 15, 1921. R. S. 1994. Appellant was born in Italy on June 10, 1922. At the time of appellant's birth, his father resided in Italy and did not come to the United States until September 6, 1922. Appellant entered this country with his mother on November 17, 1929. He was admitted for permanent residence as a non-quota immigrant. The mother was issued a United States passport in Italy. Appellant has resided in the United States continuously after his admittance. He registered for the draft in 1942 and was inducted into the Army in 1943. He received a dishonorable discharge from the Army in August 1946. The basis for his deportation as an alien was two felony convictions in Ohio.

District Judge McNamee gave careful consideration to the claims of the appellant. In a well reasoned opinion, supported by authority, he concluded that since appellant's father resided in Italy at the time of appellant's birth, the father's rights of citizenship did not descend to him and that appellant is an alien. *Weedin v. Chin Bow*, 274 U. S. 657 (1927); *United States v. Wong Kim Ark*, 169 U. S. 649.

We are in agreement with the conclusions reached by Judge McNamee and his judgment is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS.

(April 26, 1961.)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ PAUL C. WEICK,

United States Circuit Judge.

SUPREME COURT, U. S.

No. 148

FILED

JUN 30 1961

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961

ANTHONY D'ALESSIO, PETITIONER

v.

THOMAS M. PEDERSON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys,

Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	4
Conclusion	6

CITATIONS

Cases:

Montana v. *Kennedy*, No. 198, O.T. 1960, decided May 22, 1961	4, 5
United States v. *Wong Kim Ark*, 169 U.S. 649	4
Weedin v. *Chin Bow*, 274 U.S. 657	4, 5
Zartarian v. *Billings*, 204 U.S. 170	5

Statutes:

Immigration and Nationality Act of 1952, Sec. 360, 8 U.S.C. 1503	3
R.S. 1993 (1878 ed.), substantially the Act of February 10, 1855, 10 Stat. 604, Sec. 1	2, 4, 5
R.S. 2172 (1878 ed.), substantially the Act of April 14, 1802, 2 Stat. 153, Sec. 1	2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 148

ANTHONY D'ALESSIO, PETITIONER

v.

THOMAS M. PEDERSON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 14-15; Pet. App. 17-18) is reported at 289 F. 2d 317. The opinion of the district court (R. 5-11; Pet. App. 11-17) is reported at 183 F. Supp. 345.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1961 (R. 16; Pet. App. 19). The peti-

tion for a writ of certiorari was filed on June 14, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the petitioner, who was born in Italy in 1922 of United States citizen parents, is a citizen of the United States even though his father had not resided in the United States prior to the petitioner's birth.

STATUTES INVOLVED

R.S. 1993 (1878 ed.), which is substantially the Act of February 10, 1855, 10 Stat. 604, Section 1, provided:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

R. S. 2172 (1878 ed.), which is substantially the Act of April 14, 1802, 2 Stat. 153, Section 4, provided in pertinent part:

> The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwell-

ing in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; * * *.

STATEMENT

The petitioner was ordered deported as an alien who had been twice convicted of crimes involving moral turpitude. He then brought this action for a declaratory judgment of United States citizenship, in the District Court for the Northern District of Ohio, pursuant to Section 360 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1503 (R. 3-5). At the conclusion of the case in February 1960, the district court dismissed the petition on the ground that the petitioner was not a citizen under any of several statutory enactments (R. 5-11). The court of appeals unanimously affirmed (R. 14-15; Pet. App. 17-18).

The pertinent facts, which are set forth in the opinions of the district court and the court of appeals (R. 5-11, 14-15), may be summarized as follows:

On July 1, 1899, the petitioner's paternal grandfather, Antonio D'Alessio, became a naturalized citizen of the United States. In 1900, the petitioner's father was born in Italy, where he remained until his entry into the United States in September 1923. In the meantime, the petitioner's parents were married in Italy in May 1921, and the petitioner was born in that country on June 10, 1922. In September 1923,

the petitioner's father, alone, entered the United States. In 1929, the petitioner's mother applied for and received a United States passport in Naples, Italy. On November 17, 1929, the petitioner (who was then seven years of age) and his mother entered the United States. The petitioner was admitted for permanent residence as a non-quota immigrant, and has remained in the United States continuously since 1929.

ARGUMENT

There is plainly no merit to the petitioner's contention (Pet. 4-9) that he was born a citizen of the United States under the second clause of R.S. 2172, *supra*, p. 3, which conferred citizenship upon the foreign born "children of persons who now are, or have been, citizens of the United States." As this Court has repeatedly indicated, that clause has no application to cases like this, since it was not prospective in application and petitioner was born (in 1922) decades after the enactment of the legislation. *Montana* v. *Kennedy*, No. 198, O.T. 1960, decided May 22, 1961; *Weedin* v. *Chin Bow*, 274 U.S. 657, 663-664; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 673-674.

The statute which does govern petitioner's nationality is R.S. 1993 conferring United States citizenship on foreign born children of United States citizen fathers, but only if the fathers had "resided in the United States." This has been definitively construed by the Court to mean that the father must have resided in the United States at some time prior to the

birth of the child. *Weedin* v. *Chin Bow*, *supra*, 274 U.S. at 666-668, 675; see *Montana* v. *Kennedy*, *supra*; *Zartarian* v. *Billings*, 204 U.S. 170, 174-175. In *Weedin*, a case on all fours with the one at bar, the applicant for citizenship was born in China of a citizen father who had not resided in the United States until after the applicant was born. Mr. Chief Justice Taft, in speaking for a unanimous Court, pointed out (274 U.S. at 675):

> The transmission of right of citizenship is not at the death of the ancestor but at the birth of the child, and it seems to us more natural to infer that the conditions of the descent contained in the limiting proviso, so far as the father is concerned, must be perfected and have been performed at that time.

In this case, also, petitioner's father did not come to the United States until after petitioner was born.*

---

* The government does not dispute petitioner's contention that his mother was also a citizen of the United States when he was born and when she came to this country. That fact, however, is of no significance since under R.S. 1993 it was the *father's* status which governed. See *Montana* v. *Kennedy*, *supra*.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

JUNE 1961.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 599641 1481